54065

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. FRANK D. LESSEN, Defendant-Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

Honorable John F. Reynolds, Presiding.

MR. JUSTICE DRUCKER DELIVERED THE OPINION OF THE COURT.

Defendant was charged with the offense of theft in that he knowingly, intentionally and unlawfully obtained unauthorized control over property of the complainant, Children's Bargain Town, U.S.A., Inc., one Cox Flight Kit, having a value of less than $150, with the intent to permanently deprive the complainant of the use and benefit of said property. After a bench trial there was a finding of guilty and a fine of $25 and $5 costs was assessed. Defendant paid the fine but this has not affected his right to appeal. People v. Shambley, 4 Ill. 2d 38; Burns v. People, 9 Ill. 2d 477; and People v. Mosley, 100 Ill. App. 2d 361.

Defendant raises two points on appeal: (1) there is no evidence that he knowingly or intentionally exerted unauthorized control over complainant's property with the intent to permanently deprive complainant of its use or benefit, and (2) the State failed to introduce any testimony as to the value of the Cox Flight Kit.

Testimony of Joseph J. Siragusa, for the State:

He is a store detective for Children's Bargain Town, U.S.A., Inc. On December 24, 1968, he saw the defendant in the toy department put a Cox Flight Kit into a bigger airplane box. The kit is a combination of battery and fuel. The airplane box lid was open and after he put the kit inside, defendant closed the box. Defendant then went to the cashier's counter

and took all of the merchandise out of the cart and put it on the counter. The cashier itemized the price, rang it up and passed it on to the bagger. The cashier looked at the price of the airplane box and rang it up. Defendant paid for the airplane but not the kit.

He stopped the defendant from leaving the store. He opened the airplane box and took out the kit. He had a conversation with the defendant in the presence of Wally Kyle, the manager of the drug department. The witness told the defendant that he had not paid for the kit. The defendant said, "All right, so you got me. Want to make a Federal case out of it. I'll pay for it now." He told the defendant that he could not accept the money and that defendant would have to go with him. In the meantime the defendant's wife came over and asked if he was accusing her husband of stealing the kit. He stated that he did not say that. While he implied it, he didn't use that word as he preferred not to use it.

He then led the defendant to the security room. He did not call the police. He asked the defendant to sign a release and pay for the kit, and if he did so he could go. The defendant refused to sign the release. Thereafter the witness called the police and they took the defendant away.

On cross-examination he testified that a customer takes merchandise off of a shelf, puts it in a cart and goes up to the cashier for check-out. He saw defendant take merchandise off of a shelf, place it in a cart and take it up to the cashier.

The airplane requires the kit to operate it. There is a sample on top of the merchandise with the directions on display. He saw defendant look at the sample, open the airplane box and read the instructions. He also observed defendant ask where the kit was located. He could see the defendant but he did not

know whether the defendant could see him. The store was crowded as it was Christmas Eve.

The cashiers have the right to open boxes as they are checked out. He did not see the check-out girl open the airplane box and look inside. The bag boy did open the box and look inside. He had to see the kit. Defendant paid $75.51 for the merchandise that was in the cart. There were a number of items in the cart.

There are signs posted not to open boxes. Also, the public address system instructs customers not to open cartons. He observed defendant pay for the items in the cart. Defendant was not charged for the kit because the cashier did not open the airplane box.

When he stopped defendant, the defendant told him that if he had not paid for the kit he would pay for it now. He told defendant that he was not permitted to take money. However, he could have taken the money and given it to the cashier. He told defendant: "It's not that easy."

Testimony of Wally Kyle, for the State:

He is employed by Bargain Town as a drug manager. On December 24, 1968, he was in charge of the cashiers and registers (front control). He first noticed defendant as he was checking out. As defendant's merchandise went through checkout the girl held up the airplane box and got the price off of it. She rang up the price and slid it down to the bagger. She did not open the box. Defendant had his checkbook out and he okayed the check. He saw the airplane box open when the bagger looked inside and again when Mr. Siragusa opened it. He heard the conversation between Mr. Siragusa, defendant, and defendant's wife. He heard defendant say that he would pay for the kit after defendant first said he did not want it.

The customers are authorized to take merchandise off of the shelves and put it in a cart. The cashiers make spot checks opening boxes after the public address system announces to customers not to open boxes. No spot check was made in the instant case because most people are honest.

The kit is needed in order to operate the airplane. The kit is displayed about five feet from the airplane. In between the airplane and the kits are two other planes, an aisle, paints and then the kits.

The Articles of Incorporation were introduced into evidence.

Testimony of Frank D. Lessen, defendant, in his own behalf:

He lives at 1415 Wood Lane, Prospect Heights. He is a general manager and vice-president of El-Mar Plastics. On December 24, 1968, his wife and he were at Bargain Town purchasing toys for their children. While his wife was looking for bicycles he was going through the toys he had already placed in the cart. He was particularly interested in the toy airplane. He looked at the instructions inside the box and noticed that a kit was needed to operate the plane. He asked an employee where the kit was located and went to this counter to get the kit. He placed the kit inside the airplane box and closed the lid. He did not hear any announcement over the public address system that boxes should remain closed.

When he came to the check-out counter he saw the girl begin to itemize his purchases and slide them down to a bagger. He did not observe her continuously while she checked out all of the items as he was beginning to write out a check. He could not say if the girl or the bagger ever opened the airplane box as he did not observe them that closely.

After paying the cashier his purchases were placed in a larger box and he began to walk towards the bicycle counter

to pick up the bicycles his wife had chosen. Somewhere in between he was stopped by Mr. Siragusa. Mr. Siragusa did not identify himself. "He said that I have something in the box that I shouldn't have, that I am taking something from the store. I think he said, 'Open the box,' which I did." Inside was the flight kit.

"I told him, again, as the first statement I made, if I hadn't already paid for it, I would pay for it now." This was the first time he knew that the girl had not rung up the kit. Mr. Siragusa kept "saying that I was unauthorized to take this item out of" the store. Again he offered to pay for the thing and again Siragusa said it was not that easy, it would have to be settled another way.

He was taken to the security room and asked to sign a release. This would go into the company's files. The store only kept it to protect itself. He would not sign the release as it would be admitting just what he said he did not do.

Mr. Kyle was present when he had the conversation with Mr. Siragusa. Defendant could not give a reason why he put the kit inside the airplane box. When he gave the $75 check to the cashier he thought that he had paid for all of the items.

Opinion

Defendant contends there is no evidence that he knowingly or intentionally exerted unauthorized control over complainant's property and therefore he was not proven guilty beyond a reasonable doubt. In People v. Baddeley, 106 Ill. App. 2d 154, the defendant was also charged with theft and, as in the instant case, the same pertinent provisions of the theft statute were applied (Ill. Rev. Stat., 1967, ch. 38, § 16-1(a)(1)).* In

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* A person commits theft when he knowingly:
(a) Obtains or exerts unauthorized control over property of the owner; . . . and
(1) Intends to deprive the owner permanently of the use or benefit of the property; . . .

reversing the defendant's conviction the court, at page 158, held:

> Our Theft Statute, section 16-1 of the Criminal Code, supra, specifically requires, inter alia, as an essential element of the crime of theft, that the accused possess an intent to permanently deprive an owner of his property before conviction can result. Since such intent may seldom be proved by direct evidence, the Supreme Court of Illinois has held that the intent may be deduced from acts committed and circumstances in evidence. People v. Baker, 365 Ill 328, 6 NE2d 665 (1937); People v. Heaton, 415 Ill 43, 112 NE2d 131 (1953). Yet when such a test is applied here, there is grave doubt as to whether the proof supports a conclusion that defendant entertained the necessary intent as required by the aforementioned statute. Although an intent to steal may ordinarily be inferred when a person takes the property of another, proof of the existence of a state of mind incompatible with an intent to steal precludes a finding of theft.

In the instant case both Mr. Siragusa and Mr. Kyle testified that merchandise is displayed for purchase by customers on various shelves in the store. The customers are authorized to take merchandise off of the shelves, place it in the cart and move it up to a cashier for payment.

While the act of defendant in placing the kit inside the airplane box violated complainant's rules, we believe that he did not intend to permanently deprive the complainant of the use or benefit of the property. Defendant testified that he did not see any sign nor hear any announcement warning customers not to open boxes. He handed the toys in the cart to the cashier and she computed the amount he owed. He did not notice if she opened the airplane box and looked inside as he was writing out a check for payment of the toys. Upon questioning by the trial judge, defendant also testified that when he gave the check to the cashier he thought he had paid for all of the toys. The first knowledge he had that the cashier had not rung up the

cost of the kit was when Mr. Siragusa stopped him and told him that he was taking something from the store.

Thereupon Siragusa told defendant, "You did not pay for this." In the meantime the defendant's wife came over and said, "Are you accusing him of stealing this? You said he stole it." Mr. Siragusa replied that he did not say defendant stole the kit; while he may have implied it, he did not use the word "steal" for he preferred not to use that word. Mr. Kyle also testified that he heard defendant's wife come up and ask Mr. Siragusa if he was saying her husband stole the kit. Mr. Siragusa replied that he did not say that. "She said, 'Well, you called him a thief.' He [Mr. Siragusa] said, 'No, I didn't.'" Although Siragusa testified that defendant said "so you got me," the manager did not corroborate this statement but testified that defendant stated that he would pay for the kit. Defendant also testified that he told Siragusa that if he had not paid for the kit he would do so. Shortly thereafter defendant was led to the security room but the police were not called. Instead, Mr. Siragusa showed him a release and asked him to fill out the statement and pay for the kit and then he could leave. Only after defendant refused to sign the release were the police called. Although Mr. Siragusa had probable cause to stop and question the defendant, the State failed to prove the requisite mental state as required by the theft statute. Under all these circumstances, we conclude that the State failed to prove beyond a reasonable doubt that defendant intended to permanently deprive the complainant of its property and commit theft.

In view of this determination, it is unnecessary to discuss defendant's other contention.

The judgment is reversed.

REVERSED

English and Leighton, JJ., concur.

Abstract only.

52093

TRAUBCO FOOD EQUIPMENT FABRICATORS, INC., Plaintiff-Appellee, v. UNITED AUTO WORKERS, Local 588, Rank & File Union Center, AFL-CIO, Defendant-Appellant, and THE ROM COMPANY, Defendant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY. Honorable Walker Butler, Judge Presiding.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

In a 2-count complaint, plaintiff sued for $2,417.22, the balance due it for work done as a subcontractor in improving defendant's premises. Count I sought to foreclose a mechanic's lien on defendant's premises, and Count II sought a money judgment. The case was referred to a master in chancery, who filed a report with his conclusions. Defendant appeals from a money judgment entered in favor of plaintiff for $1,757.75, which was based on the theory of "equitable garnishment."

On appeal defendant asserts the issue is "whether a sub-contractor who has failed to perfect his right to a lien under the Mechanic's Lien Act can assert a claim for lien against the owner of the premises improved upon a theory of equitable lien resulting from payment by the owner to the contractor with knowledge of the unpaid claim of the sub-contractor against the contractor."

The master's report showed that in 1960 the Rom Company contracted with defendant Local 588 to improve a building owned by Local 588. The Rom Company engaged plaintiff to furnish, install and complete certain food equipment in the building for

an agreed price of $2,417.22. Plaintiff completed the work, and all of the equipment had been installed by June 9, 1960. On June 10, 1960, an officer of plaintiff made an inspection of the premises to see if all the equipment was installed.

On August 9, 1960, sixty-one days after the work was completed, George W. Lyon, secretary of plaintiff corporation, visited defendant to inquire why plaintiff had not been paid the money owed it and at the same time served defendant with notice of a claim for mechanic's lien by plaintiff in the amount of $2,417.22. On that day Rayburn Frey, financial secretary of defendant, told Lyon that they had paid all but $1,757.75 of the contract price to the Rom Company, and that "we are certainly not going to give that to the Rom Company in the light of that notice that you are giving me here. We won't do anything until this matter is satisfactorily concluded." On September 21, 1960, defendant paid Rom Company the balance due on its contract. On December 3, 1962, the Rom Company was dissolved.

The report of the master found that "the plaintiff is not entitled to a statutory lien in any amount whatsoever because the notice of lien was served late." The report further found, however, that "the plaintiff had a lien on the said sum of $1,757.75 in the nature of an equitable garnishment by virtue of its notice of lien claim and the statement of protection to that extent by the defendant Union for which plaintiff should have a money judgment in the amount of $1,757.75 with no foreclosure of any lien." The trial court entered a decree which approved the master's report in its entirety and decreed that plaintiff "do have and recover" from defendant the sum of $1,757.75 and that "execution issue forthwith."

Defendant contends that a subcontractor who has failed to perfect his rights to a mechanic's lien under section 24 of the Mechanic's Lien Act has no remedy against the owner of the

improved property. Defendant asserts (a) Illinois does not recognize an equitable lien in favor of a subcontractor; the subcontractor must perfect a statutory lien; (b) actual knowledge by the owner of the subcontractor's claim of lien does not relieve the subcontractor of compliance with the statutory conditions precident to perfecting his lien; and (c) since a money judgment cannot be entered against the owner in favor of the subcontractor when the subcontractor has failed to perfect a statutory lien, the cause of action should be dismissed.

Defendant's authorities include the following: Board of Education of School Dist. No. 108 v. Collom, 77 Ill. App.2d 479, 222 N.E.2d 804 (1966), where a subcontractor failed to perfect a mechanic's lien. There the court stated (p. 483):

> "'Mechanics' Liens are purely statutory. They were unknown to the common law or to equity and this court has uniformly held that statutes creating such liens must be strictly construed.' * * * In the absence of statute or special contract provision a subcontractor supplying material or labor to a contractor is only a general creditor of such contractor. Statutes granting such subcontractor's rights against the improvement or in the proceeds of the contract are deemed to be in addition to rights of such subcontractor against the contractor. * * * It is undisputed that Appellee McDonald could have perfected its subcontractor's lien under section 23, chap. 82, Ill. Rev. Stats. 1959, by following the procedure therein described. In seeking the application of equitable principles and in support of the judgment of the court below Appellee McDonald makes no effort to justify or excuse its failure to perfect its lien but relies solely on its status as an unpaid subcontractor having supplied material and labor.
>
> "No Illinois precedent dealing with this precise issue has been called to our attention. We have been unable to find any precedent supporting Appellee's theory of an equitable lien. In our opinion Appellee's only opportunity to assert a priority over other creditors was to perfect his lien under the Mechanics' Liens Statute. Failing to do this places Appellee in the same position as other general creditors."

Suddarth v. Rosen, 81 Ill. App.2d 136, 224 N.E.2d 602 (1967), where the court said (p. 139):

> "Mechanic's lien statutes afford extraordinary remedies to certain classes of contractors and subcontractors and it is not unreasonable to expect them to conform to the requirements of the law that creates those remedies.

> Obviously, without a mechanic's lien statute, the plaintiff would have no redress against the owners of the property or their lending institution. The General Assembly has seen fit to grant to a subcontractor, such as the plaintiff, a potent device to secure payment of his improvement of real property by its provision that a lien can be placed against the property so improved. However, the legislature has required that the subcontractor adhere to certain technical procedures to effectuate his lien and his failure to do so means simply that he has not availed himself of the remedy extended and that he has no lien.
>
> "The courts of this State have repeatedly ruled that the notice to the owner as required by the statute is the 'very substance of the basis on which a mechanic's lien may be predicated.' * * * The service of the notice has been described as a 'precedent to the creation of a lien.' * * *
>
> "The statute makes no exceptions for cases where the owner may have actual notice of the subcontractor's claim from some source other than those included in section 24."

Also, Wise v. Jerome, 5 Ill. App.2d 214, 124 N.E.2d 292 (1955), where the court stated (p. 221):

> "It would be inconsistent to hold that the trial court in a suit to foreclose a mechanic's lien is clothed with powers restricted by the statute under which the suit was brought and at the same time with the broad general powers possessed in other classes of cases. Such a lending of powers would render moot and ineffective the rule of strict construction applicable to statutory proceedings."

And at page 222:

> "Under these cases we hold that it is still the settled law of this State that where plaintiff has failed to establish his mechanic's lien, the court has no authority, in that suit to enter a money judgment or personal decree. The only proper decree is to dismiss the bill for want of equity."

Plaintiff contends it was entitled to a lien "in the nature of an equitable garnishment" and to a money judgment because of defendant's payment to the Rom Company with knowledge that plaintiff's bill was not yet satisfied and after having led plaintiff to believe that the bill would be satisfied from the funds remaining in defendant's hands. Authorities cited include: Calacurcio v. Levson, 68 Ill. App.2d 260, 215 N.E.2d 839 (1966), and Sentel v. James, 16 Ill. App.2d 373, 148 N.E.2d 22 (1958). In Calacurcio v. Levson, plaintiff advanced money to finance the remodeling of defendant's property but was not repaid.

Plaintiff filed a complaint in two counts, the first seeking a mechanic's lien and the second an equitable lien. Count I was dismissed, but on Count II plaintiff was awarded an equitable lien. In affirming that judgment, the court stated (p. 263):

> "The trend of modern decisions is to hold that in the absence of an express contract, a lien based upon the fundamental maxims of equity may be implied and declared by a court of equity out of general considerations of right and justice as applied to the relationship of the parties and the circumstances of their dealing. Sentel v. James, 16 Ill. App.2d 373, 148 NE2d 22. An equitable lien is the right to have property subjected in a court of equity to payment of a claim. It is neither a debt nor a right of property, but a remedy for a debt. * * * In this case the trial court determined that plaintiff had expended his own money for the improvement of property belonging to the Levsons and that he did so at their request. To permit them to enjoy the benefits of the improvements without impressing a lien on the property in favor of the plaintiff would constitute unjust enrichment. It is a general rule that if a stranger makes an improvement on land of another, the improvement becomes the property of the owner of the land. In equity, if the owner stands by and permits another to spend money in improving the land, there is an implied promise that the owner will pay the reasonable value of the improvements."

After considering the facts in the instant case in the light of the foregoing authorities, we are not persuaded that plaintiff was entitled to an equitable lien against defendant. The authorities cited by plaintiff are not factually similar, and in each instance there was a direct relationship between the parties which established a debt, duty or obligation, which is an essential element of equitable claims. (Marshall Savings & Loan Assn. v. Chicago Nat'l Bank, 56 Ill. App.2d 372, 378, 206 N.E.2d 117 (1965).) Here, defendant was under no legal duty to pay plaintiff the $1,757.75, which had been withheld from the Rom Company. A subcontractor's remedy against the owner in the absence of a contract with the owner is in the form of a mechanic's lien. Suddarth v. Rosen.

Plaintiff in the instant case, having failed to perfect a mechanic's lien by serving notice within the statutory period, cannot assert a different remedy against defendant. There was no contractual arrangement between the parties because

any work done by plaintiff in improving defendant's premises was done at the request of the Rom Company, not the defendant. Also, defendant's promise to pay the $1,757.75 it had withheld from the Rom Company was unenforceable due to lack of consideration. Under these circumstances, we conclude it was error for the trial court to create an equitable lien in favor of plaintiff. Under the facts set forth, the only proper decree was to dismiss the complaint for want of equity.

For the reasons given, the judgment appealed from is reversed.

REVERSED.

BURMAN, P.J., and ADESKO, J., concur.

Abstract only.

53227

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.
FREDDY L. JONES,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

Hon. Jacques F. Heilingoetter Presiding.

MR. JUSTICE ADESKO DELIVERED THE OPINION OF THE COURT:

Defendant was charged with the offense of burglary. The Public Defender was appointed as his counsel and he entered a plea of not guilty. On September 15, 1967, the defendant informed the court that he wished to change his plea of not guilty to guilty as to the offense charged. The trial judge questioned defendant with regard to changing his plea. The judge then informed the defendant of the penalties which he could impose for the crime charged and the defendant affirmatively acknowledged his understanding. Defendant persisted in his plea of guilty after the trial court's admonishment. The court then entered judgment on the plea and conducted a hearing on aggravation and mitigation. Defendant was sentenced to serve a term of one to four years in the penitentiary. Defendant filed a notice of appeal and the Public Defender was appointed to represent him. Subsequently, the Public Defender withdrew from this appeal and private counsel was appointed to represent the defendant before this court.

Defendant's private counsel has filed a motion to withdraw from the case on the ground that after a careful examination of the record he has concluded that an appeal would be wholly frivolous and could not possibly be successful. Counsel has filed a brief in support of the motion in which he concluded that from an examination of the record, the only possible charge of

error which could be urged would be the trial court's admonishment to the defendant as to the consequences of pleading guilty.

We agree with defense counsel that the record establishes beyond question that the court's admonishment was more than adequate and that an appeal upon that point would be frivolous. Ill. Rev. Stat., Ch. 38, §115-2 (1967); Ill. Sup. Ct. Rule 401(b) (1967); People v. Kontopoulos, 26 Ill. 2d 388, 186 N.E. 2d 312 (1962).

On May 26, 1969, defendant was notified by this court of his counsel's motion to withdraw and was sent copies of that petition and the brief in support thereof. Defendant was instructed that he had until July 24, 1969, to file any points he might choose in support of his appeal. The defendant has failed to file any such points.

We have thoroughly considered counsel's brief in support of his motion to withdraw and have fully examined the record of proceedings in accordance with the requirements of Anders v. California, 386 U.S. 738 (1967) and People v. Jones, 38 Ill. 2d 384, 231 N.E. 2d 390 (1967). We conclude that the appeal is wholly frivolous and that counsel should be allowed to withdraw. The judgment of conviction is affirmed.

JUDGMENT AFFIRMED.

BURMAN, P.J., and MURPHY, J. concur.

(Abstract Only)

54171

THERESA CAMPO,

Plaintiff-Respondent,

v.

CLARK THEATER and ED TRINZ, ANN A. TRINZ, BRUCE S. TRINZ, JAMES K. TRINZ, MURIEL LUBLINER, ROBERT LUBLINER, BEE LUBLINER, GLADYS RUBIN and JACK A. WINTER, a partnership,

Defendants-Petitioners.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Hon. Chester J. Strzalka
Judge Presiding.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

In a nonjury trial for personal injuries, judgment for $2500 was entered in favor of plaintiff. Subsequently the trial court granted plaintiff a new trial. Defendants appeal, contending that the trial court was without jurisdiction in this case to award a new trial after the lapse of thirty days from the entry of the judgment. Plaintiff has filed no brief.

The record shows that the judgment for plaintiff was entered on April 3, 1969. On May 8, 1969, more than thirty days from the entry of the final judgment, plaintiff filed a post-trial motion seeking an increase in the amount of the judgment on the basis of the evidence received during the trial. No other relief was sought by plaintiff in the post-trial motion. The motion was continued from time to time but never amended. On June 2, 1969, the trial court granted plaintiff a new trial on all issues in the cause.

We agree with defendants that in a nonjury case, section 68.3 of the Civil Practice Act requires that a post-trial motion for modification of the judgment or for a new trial be filed "within 30 days" after the entry of the judgment. After the expiration of the statutory 30-day period, the court is

without jurisdiction to change, alter or amend a final judgment unless a section 72 petition is filed. See McIntosh v. Glos, 304 Ill. 620, 136 N.E. 781 (1922).

In Brockmeyer v. Duncan, 18 Ill.2d 502, 165 N.E.2d 294 (1960), it is said (p. 505):

> "A trial court cannot review its own order or judgment and correct the same, either as to any question of fact found or decided by the court or as to any question of law decided by it after the expiration of thirty days."

In Pape v. Dept. of Revenue, 40 Ill.2d 442, 240 N.E.2d 621 (1968), it is said (p. 449):

> "Under ordinary circumstances, post-judgment motions must be filed within 30 days as provided by the Civil Practice Act (Ill. Rev. Stat. 1967, chap. 110, pars. 50(5) and 68.3(1)), and a court is without authority to allow a motion filed later than 30 days from a final judgment except in the extraordinary circumstances meriting post-judgment relief beyond the 30-day period provided for by the 2-year period within which a section 72 petition may be filed. Ill. Rev. Stat. 1967, chap. 110, par. 72.
>
> "There is nothing in the record of this case nor in the content of the September 27 motion to indicate it was intended as a section 72 motion, and it is clearly insufficient in content to warrant relief thereunder. It was apparently considered as the type of post-judgment motion contemplated by sections 50(5) and 68.3(1) but, as such, fails to meet the requirement that it be filed within 30 days of the entry of judgment. Allowance of the motion to vacate the July 12 dismissal and reinstate the case was clearly error."

From the foregoing guidelines, we find in the instant case it was error to grant plaintiff a new trial because the post-trial motion seeking modification of the amount of the judgment was not filed within thirty days after the entry of the judgment. Therefore, the matter is remanded to the trial court with instructions to vacate and set aside the order granting a new trial entered on June 2, 1969, and to reinstate the original judgment entered for plaintiff on April 3, 1969.

REMANDED WITH DIRECTIONS.

BURMAN, P.J., and ADESKO, J., concur.

Abstract only.

NO. 69-82

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. EARL SIDNEY DAVIS, Defendant-Appellant.	)	Appeal from the Circuit Court of Madison County. Honorable Joseph J. Barr, Trial Judge.

Goldenhersh, J.

Defendant, Earl Sidney Davis, was tried by jury in the Circuit Court of Madison County and convicted of the offense of Burglary (Ch. 38, Sec. 19-1, Ill. Rev. Stat. 1967). The court denied defendant's post-trial motion, heard testimony in aggravation and mitigation, denied probation, and sentenced defendant to the Illinois State Penitentiary for not less than 3 nor more than 7 years.

Defendant contends the evidence failed to prove him guilty of the offense of Burglary beyond a reasonable doubt, and further contends the trial court erroneously instructed the jury.

William Nichols testified that on the 11th day of August, 1968, at approximately 6:00 P. M. his neighbor came to his home and informed him that two individuals had been dropped off by a car near Nichols' fish market, which is located approximately one-quarter mile from his home. Armed and in the company of his neighbor, he drove to the fish market. Upon getting out of the car they sighted two men, carrying brown paper bags, emerge from the fish market and flee. The prosecuting witness and his neighbor

identified the defendant, Earl Sidney Davis, as one of the men who fled the fish market. These identifications were corroborated by the testimony of a co-defendant who admitted entering the fish market in the company of the defendant.

Nichols testified that on that day he had entered the fish market at approximately 10:00 A. M. and 4:00 P. M., at which times he had checked the lock on the door, and it was secure. When he returned to the fish market after seeing the men flee, the door had been pried open. He testified further that while nothing was missing, tools and other items of personal property which had been stored in various parts of the building were stacked by the door.

A co-defendant testified that he, his brother, the defendant and the defendant's wife, had been riding in an automobile. The three men had been drinking heavily for several days. He and the defendant left the car for the purpose of relieving themselves. After so doing they walked to the fish market, noticed that the door was open, walked in and when they heard and saw Nichols and his neighbor arrive, and that Nichols was armed, they fled. He further testified he did not know why he entered the building, but when leaving the car they had no intent to commit a theft and did not have any burglary tools in their possession.

Defendant's wife testified she was riding in a vehicle on the date of the alleged burglary, the defendant had been drinking for several days in the company of two friends, and in the vicinity of the fish market the defendant and one of his friends (the co-defendant) got out of the car to relieve themselves. She testified the driver

of the car drove down the road to turn around and on their return they were stopped by Nichols, who threatened them and caused them to leave the scene.

Defendant contends the evidence fails to prove him guilty beyond a reasonable doubt in that it fails to show there was a breaking and entering of the building. In support of his argument he cites the testimony of Nichols that although the door showed evidence of gouging and prying to gain entry, he was unable to state whether it resulted from the occurrence in question or two prior burglaries. Forcible entry is not an essential element of the crime of Burglary. People v. Hohmann, 72 Ill. App. 2d 374.

Relying on The People v. Soznowski, 22 Ill. 2d 540, defendant argues the evidence is not sufficient to prove that he entered the fish market with the intent to commit a theft. The distinction drawn by the Supreme Court in People v. Johnson, 28 Ill. 2d 441, 442, is here applicable and under the authority of that case the evidence is sufficient to sustain the conviction.

Defendant contends the trial court erred in giving People's Instruction No. 9, not in I.P.C.I., as follows:

> "A person commits the crime of burglary who, without authority, knowingly enters a building or any part thereof with intent to commit theft. To warrant a conviction of burglary, if all other elements required by these instructions are present, it is not necessary that actual or accomplished theft be shown but only the intent to commit theft. And such intent may be proved by circumstantial evidence."

This trial took place subsequent to January 1, 1969, the effective date of Supreme Court Rule 451 providing for the use of I.P.C.I. instructions.

The record shows that the court gave, inter alia, instructions

in the form of I.P.C.I. 3.02 (Circumstantial Evidence), 14.05 (Definition of Burglary), and 14.06 (Issues in Burglary).

In our opinion I.P.C.I. 14.05 adequately defines the offense, I.P.C.I. 14.06 is a sufficient statement of the issues and the instruction of which defendant complains should not have been given. However, from our review of all of the instructions we do not find the error so prejudicial as to require reversal.

In the course of cross-examination of Nichols, and again on redirect, the witness made mention of a conversation in which a threat was made to vandalize his place of business. Defendant contends that although the court sustained objections to the testimony on redirect, it was so prejudicial as to require reversal. It is apparent from the record that defendant was in jail at the time and could not have participated in the conversation, and the whole matter is so vague and indefinite that we conclude it could not have been prejudicial to the defendant.

Defendant contends that a remark during the Assistant State's Attorney's final argument was improper and prejudicial. We have examined the record and it suffices to say that in the context in which the remark was made, it was not prejudicial.

The court thanks appointed counsel for an excellent brief and argument.

For the reasons set forth the judgment of the Circuit Court of Madison County is affirmed.

Judgment Affirmed.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

NO. 69-39

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JULIA C. MELY, JOSEPH E. SKIBB and VICTORIA S. EAKINS, Plaintiffs-Appellants, vs. VANETA ROSENBERGER, Defendant-Appellee.	Appeal from the Circuit Court of Jefferson County. Honorable Alvin Lacy Williams, Judge Presiding.

Goldenhersh, J.

Plaintiffs appeal from the judgment of the Circuit Court of Jefferson County entered upon allowance of a motion to dismiss plaintiffs' complaint and cause of action.

In their complaint plaintiffs seek partition of certain lands therein described and an accounting of rents and profits, alleging that defendant, Vaneta Rosenberger, has been in possession of the premises for more than 8 years last past, and joining a number of individuals and "Unknown Owners" as parties defendant. The record does not reflect whether, or in what manner, service of summons was had on the named defendants, nor does it contain an affidavit with respect to "Unknown Owners" as required by Section 29 of the Civil Practice Act (Ch. 110, Ill. Rev. Stat.) or evidence of publication.

Defendant, Vaneta Rosenberger, appeared and filed a motion to dismiss, subsequently amended, to which are attached a number of exhibits purporting to show title in the defendant, Vaneta Rosenberger,

and her affidavit stating she had paid all the real estate taxes assessed against the property for 8 successive years.

The circuit court heard argument on the motion and entered an order which concludes as follows:

> "IT IS THEREFORE ORDERED BY THIS COURT that the said Motion of said Defendant, Vaneta Rosenberger, as amended by said Amendment to said Motion to Dismiss the Complaint and Suit and on the grounds set forth in said Motion as so amended be and the same is hereby sustained and granted and the said Complaint and said suit are hereby dismissed, and it is further ordered that Plaintiffs recover nothing from Defendants and that Defendant, Vaneta Rosenberger, has title to the property described in said Complaint by adverse possession and that said Vaneta Rosenberger go hence without day."

Section 46 of The Partition Act (Chapter 106, Sec. 46, Ill. Rev. Stat. 1969) provides:

> "Every person having any interest, whether in possession or otherwise, who is not a plaintiff shall be made a defendant to such complaint."

In the present state of the record we cannot determine whether the trial court acquired jurisdiction over the named defendants and "Unknown Owners", or whether the order purports to adjudicate alleged interests of such parties. The order does not contain the finding provided for in Supreme Court Rule 304, nor is it apparent that the inclusion of such finding in the order will serve to confer jurisdiction on this court.

Under the circumstances, we do not consider the correctness of the order or whether it is within the scope of the relief prayed in the pleadings.

For the reasons stated the appeal is dismissed.

Appeal dismissed.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

123 I.A. 298

ABST.

No. 53749

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
v.	)	COOK COUNTY.
BURNIE W. REYNOLDS, Defendant-Appellant.	)	HON. FRANK J. WILSON PRESIDING.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

In three separate indictments, two of which contained two counts, the defendant was charged with armed robbery. A fourth indictment charged unlawful use of weapon. Pleas of not guilty were entered by defendant on all indictments and the Public Defender was appointed as his counsel. On July 1, 1968, after a motion to suppress evidence was denied, defendant's counsel informed the court that defendant wished to change his pleas of not guilty to guilty as to each offense charged. The trial judge addressed the defendant and asked whether his attorney had correctly stated his intention. The defendant replied, "Yes, sir," whereupon the judge asked whether he understood that entry of a guilty plea necessarily involved waiver of his right to trial by jury. Defendant answered affirmatively. The nature of each charge lodged against him and its possible punishment was then explained by the trial judge. After informing the court that he understood this also, defendant persisted in his pleas of guilty. The court entered judgment on the pleas and a hearing in aggravation and mitigation was held. Defendant was sentenced to serve from five to eight years on each indictment for armed robbery and from four to five years on the indictment for unlawful use of weapon, all sentences to run concurrently. A notice of appeal

was filed and the Public Defender now requests leave to withdraw as defendant's attorney of record. Defendant has been furnished with (1) a copy of the petition for leave to withdraw, (2) a brief referring to any points which might arguably support the appeal, and (3) a notification of his right to raise any points he may see fit to support the appeal.

In the Assistant Public Defender's view of the case the only point which might possibly support the appeal is the sufficiency of the trial court's admonishment before it allowed the defendant to withdraw his plea of not guilty and enter a plea of guilty. As has been noted, defendant did not enter a plea of guilty until he was informed of the nature of the charges against him and the consequences of such a plea. This procedure is in accord with the requirements of the statute (Ill. Rev. Stat., ch. 38, §115-2 (1967)) and the Supreme Court Rules (Ill. Rev. Stat., ch. 110A, §401(b) (1967)). On the record before us there can be no question that the defendant knowingly, voluntarily and intelligently elected to withdraw his plea of not guilty and enter a plea of guilty as to all charges. People v. Williams, 44 Ill. 2d 334, 225 N.E.2d 385; People v. Kontopoulos, 26 Ill. 2d 388, 186 N.E. 2d 312; People v. Locklund, 114 Ill. App. 2d 477, 252 N.E.2d 692.

In a letter to this court the defendant asserted that (1) the man who first identified him was "not the same one that came to court," (2) his home and person were illegally searched, (3) his attorney was prejudiced against him, (4) he was not legally identified by a witness, and (5) the police refused to permit him to call his lawyer. These alleged irregularities, none of which are supported by the record, are said to support the appeal. We will not consider these issues

since it is well settled that a voluntary plea of guilty waives all errors and irregularities not jurisdictional. People v. Dennis, 34 Ill. 2d 219, 215 N.E. 2d 218; People v. Smith, 23 Ill. 2d 512, 179 N.E. 2d 20; People v. Gray, 102 Ill. App. 2d 129, 243 N.E. 2d 545.

In addition to studying the brief filed by the Public Defender we have made a full examination of all the proceedings in accordance with the holding of Anders v. California, 386 U.S. 738. We conclude that the appeal is, in the language of the Anders case, "wholly frivolous." The Public Defender is therefore given leave to withdraw and the judgment of conviction is affirmed.

JUDGMENT AFFIRMED

DEMPSEY, P.J. and McNAMARA, J. concur.

NO. 68-96M

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JOAN KUHL, Plaintiff-Appellee, vs. JAMES YATES and HESTER YATES, Defendants-Appellants.	)	Appeal from the Circuit Court of Madison County. Honorable Merlin Hiscott, Magistrate Presiding.

Per curiam:

Defendants appeal from the judgment of the Circuit Court of Madison County entered upon a jury verdict awarding plaintiff $1,500.00 actual and $3,000.00 punitive damages.

The record does not clearly reflect what transpired but a docket entry made by a magistrate states that defendants' attorney "via telephone consents to default of defendants." It states further that defendants, upon being called came not, a jury was selected, evidence heard, the jury instructed and a verdict returned. There is no report of proceedings at the trial and the record contains neither jury instructions nor a verdict.

A motion filed approximately 63 days later, although not so designated, asserts grounds for relief under section 72 of the Civil Practice Act (Ch. 110, sec. 72, Ill. Rev. Stat.). Although the motion is not verified its sufficiency was not questioned in the trial court and the defect is therefore waived. Wilson v. Wilson, 56 Ill. App. 2d 187.

On its face the motion states a basis for vacating the default and the allegations are not controverted. Further, it is

apparent that the allegations of plaintiff's complaint would not support a judgment for punitive damages. Under the circumstances the motion should have been allowed.

For the reasons stated the judgment is reversed and the cause remanded to the Circuit Court of Madison County with directions to allow defendants' motion, vacate the judgment and order of default, and set the cause for trial on the merits.

Judgment reversed and
cause remanded with directions.

PUBLISH ABSTRACT ONLY

ABST. 123 I.A.2 389

No. 69-163

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, -vs- WARD JONES, Appellant.	Appeal from the Circuit Court of The First Judicial Circuit Jackson County, Illinois Honorable Clarence E. Wright Judge Presiding.

George J. Moran, P.J.

Defendant was convicted of the crime of theft of property exceeding the value of $150.00 in a jury trial in Jackson County, Illinois, and given a sentence of two to five years in the penitentiary. He appeals.

POINTS RAISED ON APPEAL:

(1) There is a fatal variance between the proof and the charge made in the indictment.

(2) Since there was no proof as to the value of the check allegedly stolen, defendant's conviction of the crime of theft in excess of $150.00 cannot stand.

(3) The verdict is against the weight of the evidence.

EVIDENCE:

Bruce Barnes, for the State:

He testified that he owned and operated the Logan House Hotel in Murphysboro, Illinois, and that the defendant worked for him from October, 1968 until February 23, 1969; that the Logan House rented Box 610 at the Post Office and that during his employment defendant picked up the mail on several occasions. Defendant also deposited and cashed checks endorsed by the Logan House. On April 11, 1969 the only persons authorized to deposit or cash checks endorsed by the Logan House were himself and his bookkeeper, Mildred Husted. He identified an American Express Company check in the amount of $422.20 dated April 7, 1969 payable to the Logan House and drawn on the Morgan Guaranty Trust Company of New York. The check had the following endorsement: "Logan House Corporation, Murphysboro, Ill. 62966."

The endorsement was stamped on the check by a rubber stamp which was normally kept in the top drawer of Barnes' desk in Barnes' office. He and his secretary found that the stamp was missing on April 11, 1969 and found a week later in some empty boxes in the hallway of the hotel.

Mildred Husted, for the State:

She testified that she was employed as secretary and bookkeeper for Barnes at the time of the alleged incident, and that the defendant came into Barnes' office on April 11 about 9:30 or 10:00 a.m. and asked for Mr. Barnes. She left the office for a few minutes to find Barnes. When she returned she told the defendant who was still in the office that someone was going to find Mr. Barnes. After the defendant waited a few minutes he was told that Mr. Barnes was not up yet and the defendant said he would be back. She said the rubber stamp used to endorse checks for the hotel was in the middle drawer of Barnes' desk a few minutes after 9:00 a.m. on April 11, but she found it was missing around 11:00 a.m. of that same day. With the exception of the few minutes she had been out of the office to search for Mr. Barnes, she had not left the office between 9:00 a.m. and noon of that day and no one other than herself, Mr. Barnes and the defendant had been in the office that morning.

Larry Hornick, for the State:

He testified that he was employed as a postal clerk at the Murphysboro Post Office on April 11, 1969 when the defendant came in about 9:30 or 10:00 a.m. and asked for the mail from Box 619. Hornick gave him the contents of the box inasmuch as the defendant had picked up the mail for the Logan House on prior occasions. The same day someone called up and asked if defendant had picked the mail up and he said yes.

John Freeburn, for the State:

He testified that he is a teller at the First National Bank in Murphysboro and that on the morning of April 11 he cashed a check presented to him by the defendant and made out by American Express Company payable to the Logan House and endorsed by stamp, "Logan House Corporation, Murphysboro, Illinois 62966," in the amount of $422.20. The check was then identified and admitted into evidence.

For the defense:

Several witnesses testified on behalf of the defendant that he was in a service station about two blocks from the Logan House between 9:00 a.m. and noon on the 11th day of April, 1969. The defendant also testified that he was not in the hotel on the morning in question, but was in the service station all of that morning until about 11:45 a.m. He left the station and was picked up by the police about five minutes later.

Jerry Goforth, on rebuttal for the State:

He is a police officer for the city of Murphysboro and testified that he picked the defendant up at 4:00 p.m. on April 11 and not at 11:00 a.m. or 12:00 noon as the defendant had testified.

OPINION:

Defendant's first contention is that there is a fatal variance between the crime he was charged with in the indictment and the proof made at the trial. The indictment charged that:

> "(Defendant) committed the offense of Theft (Over $150) in violation of the provisions of Chapter 38, Paragraph 16-1 Illinois Revised Statutes in that he knowingly exerted unauthorized control over property belonging to the Logan House, Inc., a corporation, with the intent to deprive said owner premanently of the use and benefit of said property, said property being $422.20 in United States currency."

The court instructed the jury that to sustain the charge of theft the State must prove beyond a reasonable doubt the following propositions:

> "First: That the Logan House, Inc was the owner of the property in question, a check payable to the Logan House, Inc., in the amount of $422.20.
>
> Second: That the defendant knowingly obtained or exerted unauthorized control over the property; and
>
> Third: That the defendant intended to deprive the Logan House, Inc., permanently of the use or benefit of the property, a check payable to Logan House, Inc., in the amount of $422.20."

In the law of criminal pleading, a variance is a disagreement between the allegations in the indictment or information and the proof, as to some matter which is legally essential to the charge. The rule now generally established is that to make a variance between allegations in an indictment or information and the proof fatal, it must be material and prejudicial.

In Illinois a variance is not material unless it is of such a substantive character as to mislead the accused in preparing his defense or is likely to place him in danger of being twice in jeopardy for the same offense. The People v. Boneau, 327 Ill 194 at 205; The People v. Nelson, 33 Ill 2d 48; People v. Rosochacki, 41 Ill 2d 483.

In Rosochacki, supra, the defendant also contended that he was charged with one offense and convicted of another. Our Supreme Court said at 492:

> "We find that the defendant here was charged with murder and convicted of that crime, and even if a variance did exist between the type of murder charged in the indictment and the types described in the instructions, it would not vitiate the conviction unless it was of such a character as to mislead the defendant in his defense or expose him to double jeopardy. (People v. Nelson, 33 Ill 2d 48, 52, 210 NE2d 212; People v. Figgers, 23 Ill 2d 516, 518-19, 179 NE2d 626.) There is no evidence in this case whatsoever that the defendant was misled in his defense, nor did counsel at any time during the proceedings request additional time, allege surprise, or claim that it was impossible for him to prepare a defense to the proof being offered against him. See People v. Nelson, 33 Ill 2d at 52, 210 NE 2d 212."

"Property" is defined in Chapter 38, Sec. 15-1 of the Criminal Code as "anything of value" and includes real estate, money, commercial instruments, etc. In this case the defendant was not charged with one crime and convicted of another. He was charged with and convicted of having committed the offense of theft of over $150.00 in violation of the provisions of Chapter 38, Sec. 16-1, Ill. Rev. Stat.

In Hunt v. State, 72 Ark. 241, 795 SW 769, the Supreme Court of Arkansas held that under an indictment alleging that defendant stole money, proof that he stole a check upon which he obtained the money did not constitute variance, saying at 249:

> "It would be carrying technicality to a most dangerous extreme to hold that the proof of the mere instrumentalities of obtaining money constituted a variance with the charge of obtaining the money itself, where the same evidence also showed the fact of obtaining the money itself. A check is a mere order for so much money, the credit of the drawer in the bank or drawee, which it is bound to honor when made in form and properly presented. The proof also showed the money was paid to the defendant."

Since there is no showing in this case that the defendant was misled in his defense or exposed to double jeopardy, we cannot agree that there was a fatal variance between the pleading and proof in this case.

Defendant next contends that there is no proof of the value of the check allegedly stolen and that therefore the conviction cannot stand. The fact that

defendant actually obtained the sum of $422.20 for the check would seem to be sufficient proof of its value.

Defendant also contends that there was no proof that the check actually belonged to the Logan House so that the conviction cannot stand. Chapter 38, Section 15-2 provides:

> "As used in this Part C, "owner" means a person, other than the offender, who has possession of or any other interest in the property involved, even though such interest or possession is unlawful, and without whose consent the offender has no authority to exert control over the property."

Certainly, the Logan House as payee had sufficient interest in the check in question and its proceeds to come within the definition of owner as set out in the above statute.

Defendant next contends that the verdict of the jury was against the weight of the evidence. In our opinion there was ample evidence to sustain the jury's verdict.

For the foregoing reasons, the judgment of the trial court of Jackson County is affirmed.

Judgment Affirmed.

CONCUR:

Honorable Edward C. Eberspacher

Honorable Joseph H. Goldenhersh

PUBLISH ABSTRACT ONLY.

123 I.A.2d 485

No. 69-14

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ABST.

OKAW HUNTING AND FISHING CLUB, AN ILLINOIS NOT-FOR-PROFIT ORGANIZATION, Plaintiff-Appellant, vs. THOMAS CRAIG and CLARENCE BRICKEY, Defendants-Appellees.	Appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois. Honorable Richard T. Carter, Trial Judge.

EBERSPACHER, J.

Plaintiff-Appellant, the Okaw Hunting and Fishing Club (hereinafter called "plaintiff") leased certain lands from Augusta M. Mueller on September 24, 1967. Specifically excluded from this lease was a 136 acre tract of timber land which was to be purchased by the State of Illinois. On September 24, 1968, plaintiff again leased the lands in an instrument substantially similar to the previous lease.

On January 25, 1968, Augusta M. Mueller sold to defendants herein the timber standing on the aforementioned 136 acre tract. Defendants began cutting and hauling timber about the middle of November, 1968. They hauled the logs out over a road which ran over the land leased to plaintiff and the use of this road by defendants for this purpose is the issue herein.

On December 9, 1968, plaintiff applied for an order for temporary injunction from the Circuit Court of St. Clair County which order issued that same day. The court ordered that the "injunction issue without notice and without bond". The court's order further stated that the injunction was issued

> "because said private road leading to the plaintiff's club house on said tract of land described in said complaint, was in excellent condition and was oiled and rocked, making said road an all-weather road without any chuck holes therein, but since the said log rolling

equipment and heavy tractors of the defendants have been going over said all-weather roads the said roads have been broken, ruined and put in a state of disrepair on account of the heavy rains and inclement weather which has prevailed during the months of November and December in 1968, and that the said defendants are running the heavy tractors and heavy log rolling equipment over said roads, and have been ruining said all-weather roads, to the detriment of the plaintiff, which requires that said injunction be issued without notice and without bond, restraining said defendants, their agents, servants and employees from further traveling over said roads leading to the club house of the plaintiff, and thereby damaging said road leading to the club house, in their act of removing the timber from the said 136 acres."

The writ of injunction was served on defendants on December 12, 1968. In accordance with the writ a hearing was held on December 16, 1968.

At the hearing evidence was presented by both parties as to the condition of the road prior to defendants' operation and subsequent thereto. Plaintiff presented a number of witnesses who testified to the damage to the road caused by the defendants' trucks. Defendants' witnesses testified to the opposite effect, stating no damage had been done. In addition both parties introduced pictures which purported to show the damage or non-damage, as the case may be, which had been inflicted on the road.

At the conclusion of the hearing the matter was taken under advisement. The court subsequently issued its opinion dissolving the temporary injunction. Plaintiff has brought this appeal seeking to overturn the trial court's opinion and seeking a reinstatement of the injunction.

The trial court found, inter alia, that, "there was absolutely no testimony by way of any of the witnesses who testified on behalf of the Plaintiff or Defendant, that any extensive damage or irreparably injury to the road has resulted as a result of the Defendants using the road in question. The photographs did not substantiate, in the court's opinion, that any substantial damage had taken place". After reviewing the record in this matter we find substantial evidence to support the trial court's opinion. As the Supreme Court stated in Brown v. Zimmerman, 18 Ill. 2d 94, 163 N.E. 2d 518, 523 (1959):

". . . . the determination of this case depends largely upon the facts to be found in the record. In such situations the findings

and judgment of the trial court, in chancery and nonjury cases, will not be disturbed by the reviewing court, if there is any evidence in the record to support such findings."

Therefore we affirm the trial court's dissolution of the temporary injunction.

Judgment affirmed.

CONCUR: /S/ George J. Moran

CONCUR: /S/ Joseph H. Goldenhersh

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